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China's Antimonopoly Law 2008: An Overview

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Abstract This article outlines the economic, legal, and political background, general features, main provisions, and enforcement mechanisms of China's Antimonopoly Law 2008 and describes some early developments in its application.

Keywords China's anti-monopoly law · Law and enforcement with Chinese characteristics

1 Introduction

China's *Anti-Monopoly Law* (AML) was adopted on 30 August 2007 and came into effect on 1 August 2008. Its introduction was an inevitable consequence of China's decision in the late 1970s to adopt a policy of reform and opening up of the economy internationally, and in 1993 to take further critical steps towards implementing a "socialist market economy" philosophy. China, like most other countries, recognised that once the market is acknowledged as being the main means by which goods and services are delivered to the community, governments have to ensure that the market works well and this above all requires the market to be competitive or at least not to be hindered by unwarranted anticompetitive structures and behaviour.

Following some piecemeal steps towards the introduction of competition policy in the 1980s, work on a modern comprehensive competition law commenced in 1994. Then followed a lengthy process of drafting, debate, and very extensive and often fruitful consultation internationally as well as within China. The outcome is a law that broadly resembles best practice competition law of other countries, although the law also has considerable scope for alternative interpretations and as the Chinese

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themselves affirm, "Chinese characteristics", which are adaptations stated to be suitable to China's stage of development and socialist market economy policies.

This article outlines the political and economic background of the AML, the history of China's competition law prior to 2007, the main rules of the AML, the administration and enforcement arrangements, and some early developments. The article particularly focuses on three issues: (1) the "Chinese characteristics" of the law; (2) the special treatment of the problem of "administrative monopoly"; and (3) the challenges of administering and enforcing the new law in a country with such a large population and a distinctive economic, legal, and political system. The article concludes by identifying current issues and challenges.

2 Economic and Political Background

From 1949 to 1978 central planning in China largely suppressed the role of the market and of competition (Naughton 2007). The role of the law as a means of settling commercial disputes was also weakened. Since 1978, however, there have been three broad developments that are especially relevant to competition law and policy:

The first has been a transformation away from central planning—essentially discarded after 1978—and in the direction of a market economy, albeit with a substantial continuing government role. China terms itself as a "socialist market economy", a term that has many connotations but implies, inter alia, a commitment to a market-driven, open economy but with a significant degree of state planning and intervention and a substantial role for state-owned enterprises (SOEs).

In 2006, the State Council affirmed a core role for SOEs, stating that the "State should solely own, or have a majority share in, enterprises engaged in power generation and distribution, all petrochemicals and natural gas, telecom and armaments. The State should also have a controlling stake in the coal, aviation and shipping industries...Central SOEs should also become heavyweights in sectors including machinery, automobiles, IT, construction, iron and steel and non-precious metals."[1]

In addition, there is state dominance in banking, insurance, much of the rest of finance, media, tobacco, and railways.

The second development has been the dramatic transformation from being an economically backward, agricultural-based economy to a modern economy with a strong industrial base, a much higher level of average income than was true 30 years ago, and a considerable exposure to the world economy through trade and investment as well as through the World Trade Organisation (WTO) accession in 2001.

The third has been a gradual trend not only to the restoration of a role for the law as an instrument for resolving commercial disputes but also to the adoption of Western (especially European) commercial law approaches both in terms of substance and process. This trend, however, has far to go before it could be equated with Western practices. Moreover, the adoption of the *role* of law is not to be equated with the

[1] See Questions and Answers regarding China's SOEs at http://www.china.org.cn/english/features/Q&A/161765.htm; also see the National Bureau of Statistics of China, Communiqué on Major Data of the Second National Economic Census (No. 1), at http://www.stats.gov.cn/english/newsandcomingevents/t20091225_402610168.htm.

adoption of the *rule* of law, with its like treatment of like persons, irrespective of their status or relationships. There is also a considerable way to go in this dimension if Western standards are to be achieved (Peerenboom 2002).

Besides these developments there are a number of significant continuing features of the economic and political environment that bear on competition law. First, there is much official and public concern about any potential foreign dominance of Chinese business and a strong desire to build up Chinese business, including "national champions", that can participate in Chinese and global markets. There is also, however, a desire to benefit from technology transfer from foreign to Chinese interests; to gain access to foreign markets; to learn about competition law from foreign countries; and to benefit from cooperation from other competition law enforcement agencies in appropriate cases (Huang 2008, 122–123).

Second, there are conventional debates about the role of competition law and policy in the economy. These debates are not dissimilar to those in developed and developing economies about underlying policy objectives, core characteristics and processes, administration and enforcement, and the relationship of competition policy to other policies, such as industrial policies (Wang 2009, pp. 584–587).

Third, the coexistence of a system of economic reform and modernisation with a non-democratic party-led socialist economy system establishes a somewhat different political or "authorising" environment within which competition law and policy works (Huang 2008, pp. 118–119). And fourth, with 1.3 billion people and the substantial geographic spread of the population, China's governance, administration, and enforcement present large challenges for competition law.

3 Development of Competition Law Prior to 2007

Many laws and regulations with competition elements were enacted after 1978. They were not comprehensive, but piecemeal. Importantly, many remain in force notwithstanding the AML and hence need review. China's first regulation about competition, issued by the State Council in October 1980, was the *Interim Provisions for the Promotion and Protection of Competition in the Socialist Economy*, widely referred to as the "Ten Articles on Competition". They stressed the importance of eliminating regional blockades and department divisions, ordering that no region or department may blockade the market or prohibit the sale of commodities originating in other regions or departments. However, they relied on the regions and departments themselves to implement these principles, with seemingly limited effect (Wang 2002, pp. 216–217).

The *Circular on the Prevention of Regional Market Blockades* was issued in November 1990. Thus the question of regional restrictions on competition, trade and investment—often termed as "administrative monopoly"—was recognised from the start of the reform period as very important, probably even more important than other competition questions. It remains critical and is addressed in the AML, as discussed below (Wang 2002, pp. 221).

Formal competition legislation began in the late 1980s. The first general law that related to competition was the *Anti-Unfair Competition Law* (AUCL), which was

adopted in 1993.[2] The AUCL prohibits unfair trading practices, including passing off, commercial bribery, misleading advertising, commercial secrets infringement, illegal prize-attached sales, and defamation, and certain types of anticompetitive behaviour, including designated transactions by public utilities, administrative monopoly, below-cost sales, tying, and bid rigging.[3]

The AUCL addresses abusive behaviour by utilities. It prohibits public utilities and statutory monopolies from imposing certain restrictive transactions on their customers (AUCL, Art. 6). These prohibitions concern telecoms, electric power, and water and gas suppliers that supply services only if customers buy designated telephones, distribution boxes, meters or heaters (Wen 2008, pp. 165–166). The AUCL also prohibits sales below cost and tying (AUCL, Arts. 11 and 12). These prohibitions, however, do not depend on showing that the firm has a dominant position. The AUCL prohibition on sales below cost is not a per se rule as it contains a requirement of intent to eliminate competitors, and it provides for exceptions (AUCL, Art. 11).[4]

The State Administration for Industry and Commerce (SAIC) and its local administration for industry and commerce branches (AICs) above the county level are the primary enforcement agencies of the AUCL (AUCL, Art. 3).[5] Enforcement is mainly entrusted to the AICs, and they are principally active in cases about passing off, misleading advertising, and commercial bribery.

In 1997, the Price Law was adopted mainly as a price control law for key commodities and services, but it also prohibits certain "unfair price activities", including collusion to control price, below-cost sales, discriminatory pricing, and seeking exorbitant profits.[6] The National Development and Reform Commission (NDRC), which enforces the Price Law, issued the *Interim Provisions on Preventing Price Monopoly* in 2003 to elaborate its prohibitions and made some progress towards putting them into a competition policy framework by linking them to the existence of dominance. These regulations provided that a firm may not rely on its "market predominant position" to engage in exploitative, predatory or discriminatory conduct.[7]

[2] The AUCL was promulgated by the Standing Committee of the National People's Congress (NPC) on 2 September 1993 and effective on 1 December 1993, English translation available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383803.htm.

[3] See AUCL, Arts. 5, 8–10, 13–14 on unfair trading practices and Arts. 6, 7, 11, 12, and 15 on anticompetitive behaviour.

[4] The exceptions include the sales of fresh goods, seasonal goods, goods nearing expiry, or other overstocked goods at reduced prices or the sales of goods at reduced prices due to debt repayment, switch in production, or close of business.

[5] However, it should be noted that Article 3 has caused potential inter-agency conflicts between the SAIC and other administrative bodies because it further provides that where laws or administrative regulations stipulate that other departments shall exercise the supervision and inspection of unfair competitive behaviour, those provisions shall apply.

[6] See Price Law, Art. 14. The Price Law was promulgated by the Standing Committee of the NPC on 29 December 1997 and effective on 1 May 1998, English translation available at www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=50956.

[7] The Interim Provisions on Preventing Price Monopoly were repealed on 1 February 2011 alongside the entry into force of the NDRC's *Measures on the Prohibition of Price Monopoly*, which accompany the AML. See the discussion in Sect. 7.1 below.

The *Provisions on the Prohibition of Below-Cost Sales*, which was issued in 1999, expanded the notion of what is considered to be a sale "below cost" under the Price Law. The term "cost" refers to the cost of production and operation. This probably implies a test based on variable cost, although average cost and the scope of the price cut may be relevant if variable cost cannot be determined. The provision applies if there is intent to eliminate competitors or monopolise the market; pricing below cost is permitted for such reasons as clearance sales.[8] The *Administrative Measures for Fair Transactions between Retailers and Suppliers* (hereinafter "Retailers and Suppliers Measures"), which was issued in 2006, prohibits agreements requiring resale price maintenance directly sold by suppliers to consumers and other operators, tie-in sales, or exclusive dealing. The Retailers and Suppliers Measures also cover other common topics of dispute in distribution relationships, such as timely payments, returns, and promotional support.[9]

In 2003, a merger-control regime was introduced as part of the *Interim Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (the M&A Rules). The M&A Rules provided a basic regulatory framework for mergers and acquisitions of domestic enterprises by foreign investors and included provisions that relate to competition issues that are raised by such transactions.[10]

Three bodies—the SAIC, the NDRC, and the Ministry of Commerce (MOFCOM)—have been principally responsible for enforcing these competition-related laws and regulations. However, the three agencies and their corresponding local bureaus have shared enforcement powers, and the situation has seemingly caused some lack of coherence in enforcement activities.

4 The Overlap Between the AML and other Competition Provisions

The AML does not explicitly repeal and therefore coexists with many competition provisions that exist in other laws and regulations. Based on the general principles of hierarchy of Chinese laws, the AML as the more recent economy-wide legislation should take precedence over previous laws and regulations in cases of conflict.[11] However, to the extent that it does not contradict the AML, prior legislation may apply concurrently with the AML.

The overlap between the AML and prior laws and regulations has caused uncertainty because similar conduct may incur different sanctions pursuant to different laws and regulations. Furthermore, conduct that does not infringe the AML may infringe other laws. For example, under the AML, a member of a price cartel or a dominant

[8] The Provisions on the Prohibition of Below-Cost Dumping Conduct were promulgated by the former National Development and Planning Commission on 3 August 1999 and effective on the same day, official Chinese text available at http://www.ndrc.gov.cn/zcfb/zcfbl/zcfbl2003pro/t20050707_27844.htm.

[9] The Retailers and Suppliers Measures were promulgated on 12 October 2006 and effective on 15 November 2006, English translation available at: http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=74959.

[10] The M&A Rules were issued on 7 March 2003 and effective on 12 April 2003, English translation available at: http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=51173. The M&A Rules were revised in 2006 and 2009, respectively.

[11] See Legislation Law of China, Arts. 79 and 83.

undertaking that commits abusive tying may incur, among other things, a fine of up to ten percent of its turnover in the preceding financial year (AML, Arts. 46 and 47), while under the Price Law, a price cartel may incur a fine of up to five times the illegal gains (Price Law, Art. 40); and under the AUCL, tying is prohibited irrespective of the business operator's market position, but the wrongdoer is only subject to civil damages to the injured business operator (AUCL, Art. 20).

Another example is bid rigging. Although not explicitly prohibited under the AML, bid rigging, as a type of hardcore cartel, could be caught under Article 13 (6) of AML, and the wrongdoer could be fined up to ten percent of its turnover in the preceding financial year.[12] However, bid rigging is also prohibited under the AUCL and the Bidding Law and can be prosecuted under the Criminal Law, where conviction could lead to fines and up to 3 years' imprisonment. Enforcement against bid rigging has resulted in particularly strong sanctions.[13] In this area, as in other areas of overlap, regulators have a choice as to the law or set of laws that they apply.

Accordingly, the AML cannot be considered in isolation from preceding laws, some of which, if applied, go beyond the generally accepted principles of competition law with its emphasis on the protection of competition, not competitors.

Finally, price control laws remain. Although they are not usually regarded as part of competition law, they have a relationship. A price law may affect competition—a ceiling on monopoly prices may deter entry or, in the case of oligopoly, facilitate collusion—or in other cases may replace the application of competition law. Currently, there are signs of a rise in inflation in China, and this may generate greater recourse to price regulation with possible side-effects on market functioning and competition.

5 General Features of the Antimonopoly Law

In May 1994, the AML was formally placed on the legislative agenda, and the government formed a group to draft an antimonopoly law. The group was drawn principally from the State Economic and Trade Commission (SETC) and the SAIC. The first complete draft of a law appeared in November 1999. This draft included most of the features of the AML that took effect in August 2008. Many issues—including the design of the enforcement mechanism, the treatment of cartels and takeovers by foreign enterprises, the issue of administrative monopoly, and the policy towards SOEs—were heavily debated during the legislative process.

Before we consider the details of the AML, some of its general features may be noted. The AML is essentially similar to standard best-practice competition laws:

[12] Article 13(6) of the AML is a sweeping provision that prohibits "other monopoly agreements as determined by the anti-monopoly enforcement agencies".

[13] For example, two officials who were convicted of bid rigging and bribery in 2004, in connection with reorganising state enterprises, were sentenced to prison for 13 years; see China News, 'Two Officials of Shanxi Yuncheng Sentenced to 13 years imprisonment', available at: http://news.sina.com.cn/c/2004-06-19/18352852259s.shtml (in Chinese). Enforcement against other kinds of price fixing agreements has not been as vigorous so far. The fate of a short-lived "price alliance" among nine TV manufacturers shows the beginning of stronger policy response; see Wang, 2002, p. 208. In the past, official calls for "self-discipline" in pricing sometimes led to market results that were the equivalent of collusion.

Its general prohibitions on anticompetitive agreements, abuse of dominance, and anti-competitive mergers are in language that is similar to that of most OECD countries. The flavour of the law is broadly European and especially Germanic rather than North American.

The scope of the AML is comprehensive in that it covers the entire economy, although there are provisions for exclusions and exemptions that are similar to those in most OECD countries, though more expansive in tone, as is discussed later. The AML also establishes legal processes, administrative procedures, and sanctions. Whilst the Chinese have generally sought to adopt world best practice, it is also clear that the AML has "Chinese characteristics"; this is a point that has been proclaimed by Chinese authorities and is discussed below.

A somewhat unusual feature of the AML is its prohibition on the abuse of administrative powers to eliminate or restrict competition. This is unusual as most competition statutes are restricted to anticompetitive behaviour by businesses.

Similar to the basic provisions of the US and EU competition laws, the AML is expressed in broad language. In addition, it is customary for Chinese laws to be expressed in a general manner. It appears that at some points the AML deliberately incorporates ambiguous language to leave space for discretion and future development and seemingly accommodates unresolved policy questions.

It is intended that the AML will be delineated by guidelines, regulations, and rulings. Therefore, to understand it one needs to look at the guidelines that accompany it as well as specific decisions. A number of guidelines have already been published and are discussed in Sect. 7.

5.1 Objectives and General Principles

Chapter I of the AML sets out the objectives and general principles. Of particular importance to the understanding of the objectives of the law is Article 1 about the purpose of the law and Article 4 about the basis of the establishment and implementation of the competition rules.

Article 1 states that:

> This Law is enacted for the purpose of preventing and restraining monopolistic conduct, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, and promoting the healthy development of the socialist market economy.

Article 4 states that:

> The State constitutes and implements competition rules which accord with the socialist market economy, perfects macroeconomic regulation and control, and advances a unified, open, competitive and orderly market system.

During the drafting process there was considerable repositioning and fine tuning of the wording, which reflected tensions and disagreements about the goals of the law. Earlier drafts of the law placed somewhat stronger emphases on goals such as the healthy development of the socialist market economy; but in the final version this was

included only as the last of the objectives, though clearly it remains of vital importance. Moreover, unlike some earlier drafts, the final draft includes reference to the improvement of efficiency, thereby to that extent bringing the Law into line with most economics-based competition law approaches around the world.

A number of policy goals are involved in these articles. China has never had a commitment to the adoption of a full scale capitalist economy with private ownership of production assets. In this context the inclusion of the goal of "promoting the healthy development of the socialist market economy" in Article 1 and the reference to the "socialist market economy" in Article 4 underlines that there is a qualified adoption of the more conventional Western goals of competition, efficiency, and fairness. This introduces a significant degree of conflict and ambiguity into the underlying principles of the law and leaves room for the avoidance of the application of commonly accepted competition principles, especially with respect to the treatment of SOEs and administrative monopoly, which are two of the most important areas with which competition policy in China must engage.

There is also an indication of a national interest in the development of large Chinese businesses in Article 5, which provides that:

> Undertakings may, through fair competition, and voluntary alliance, concentrate themselves according to law, expand the scope of business operations, and enhance competitiveness.

Article 5 can be read in various ways: It is perhaps simply an acknowledgement that, as in any economy, business concentration, including mergers and acquisitions, can occur. It could also be taken, however, as a signal that the AML merger control rules will not be applied too strictly, especially to pure domestic transactions or transactions that are initiated by national champions. In this context, it is also noteworthy that a report that was issued by the SAIC in 2004 called for a stronger competition law to protect against anti-competitive strategies of large foreign firms.[14] If the anti-monopoly enforcement authority takes the position that foreign firms present particularly serious threats to competition, then foreign firms may face closer enforcement scrutiny.[15]

5.2 Limits of the AML

5.2.1 Special treatment for SOEs

Article 7 of the AML provides that the state shall protect the legitimate operating activities of industries that are dominated by the "state-owned economy" which are

[14] See Fair Trading Office of the State Administration for Industry and Commerce, 'Anti-competitive Behaviour of Multinational Companies in China and the Counter Measures'. For the Chinese version see *Journal of Administration of Industry and Commerce*, 2005, May Issue.

[15] For many years international competition meetings and conferences have been dominated by calls for the adoption of competition law in all countries. Although there have been many reasons for these calls, one reason seems to have been the idea that foreign investment would be better protected in the presence of a competition law. The reverse notion—that the law might potentially be applied to restrict foreign enterprises and create opportunities for local firms—has less often been acknowledged.

vital to the Chinese national economy or national security or both and of those undertakings with statutory rights of exclusive operation or sales. Article 7 further provides that the state will supervise and control these undertakings' operations and prices in order to protect the interests of consumers and to promote technological progress. In addition, these undertakings are required to operate in good faith and in accordance with the law, and to accept public supervision, and are prohibited from using their exclusive or controlling positions to harm consumers.

Article 7 is deemed as a compromise between competition law and industrial policy, and there are three possible interpretations: One is that there is a virtually complete exemption for SOEs. At the other extreme, there is full application to SOEs. An intermediate position is that the law applies to SOEs in most respects; but where there are explicit state-required operating activities that could run foul of the application of competition law they are protected. Such circumstances sometimes arise in OECD economies, where a utility is required to comply with competition law but not to the extent that it cannot implement statutory or other government requirements that could conflict with these laws (e.g. pricing that provides subsidies to particular classes of customer). An interesting example of such a case could arise if an SOE defended an abuse of dominance charge on the grounds that it was necessary to retain dominant status in order to meet social obligations such as providing a loss-making cross-subsidy.

The treatment of SOEs does not differ as much from what is observed in OECD economies as may first appear. In many such economies there has been a history of state-owned (or sometimes privately owned) vertically integrated monopolies in the area of public utilities (e.g., energy, communications, transport). The application of competition law in these areas is quite limited. A pure monopolist has no competitors to collude or merge with, nor to exercise dominance against. To introduce competition, what is needed is a set of steps beyond the scope of competition law—such as the removal of entry, trade and investment barriers; the promotion of interregional and international competition; horizontal and vertical disaggregation; "essential facilities" laws; and competitive neutrality laws—and only after that does competition law become relevant, usually highly relevant.

5.2.2 AML Exclusion for the Agricultural Sector

The only sectoral exclusion from the AML involves agriculture. The AML provides a statutory exclusion for agricultural producers by declaring that it will not apply to alliances or concerted actions among agricultural producers and rural economic organizations in operational activities such as the production, processing, sales, transportation, and storage of agricultural products (AML, Art. 56). This is not uncommon in OECD countries.

5.3 AML and Intellectual Property Law

The AML stipulates that it does not apply to the conduct of undertakings in exercising their intellectual property rights in accordance with applicable laws and regulations. However, conduct of undertakings to eliminate or restrict competition by abusing their

intellectual property rights shall be governed by the AML (Art. 55). The AML does not clarify which types of behaviour would be construed as an abuse of intellectual property rights. It is understood that the SAIC is drafting the guidelines on the interface between the AML and intellectual property rights and will issue the guidelines at some future date.

6 Main Rules of the AML

The AML covers four principal areas: anticompetitive agreements, abuse of dominance, anticompetitive mergers, and administrative monopoly. The AML applies to "undertakings", which are defined as "natural persons, legal persons or any other organizations that engage in the manufacture of or trading in goods, or the provision of services" (AML, Art. 12). Through the prohibition on administrative monopoly, the AML also applies to "administrative organs and other organizations administering public affairs in accordance with the law" (hereinafter collectively referred to as "public authorities") that abuse their administrative powers to eliminate or restrict competition.

Article 2 of the AML relies on the effects doctrine as a basis to assert jurisdiction over anticompetitive conduct that occur outside of China. Conduct that "has eliminative or restrictive effects" on competition in the Chinese domestic market may trigger the application of the AML. A textual reading of the AML does not require directness, substantiality, or foreseeability as conditions, similar to those required by US and EU competition law, to apply the law extraterritorially, but this may emerge as case law develops over time. Irrespective of this, the worldwide reach of the Chinese economy, and the extensive involvement, directly and indirectly, of most of the world's largest corporations, means that China is already an important entity in global competition law enforcement and is likely to be of comparable importance to the EU, US, and Japan within a few years.

6.1 Monopoly Agreements

Chapter 2 of the AML prohibits a range of horizontal and vertical anticompetitive agreements, which are termed "monopoly agreements" and defined as "agreements, decisions or other concerted practices that eliminate or restrict competition" (AML, Arts. 13–16).

6.1.1 Horizontal Agreements

Article 13 of the AML provides a non-exclusive list of prohibited horizontal monopoly agreements, according to which competing undertakings are prohibited from agreements on price fixing, output restriction, market sharing, restrictions on products or technology developments, and boycotts. The prohibition on restrictions on the purchase of new technology or equipment seems to be a reflection of another agenda: Chinese concern about technology transfer being restricted by agreements. Article 13

also provides a sweeping clause to prohibit other horizontal monopoly agreements as determined by the enforcement agencies.

Article 13 does not make clear whether any or all of the agreements are prohibited per se. There is no substantiality element in the test, so that the law covers all agreements, even if of minimal effect. Moreover, as discussed below, Article 15 provides for a wide range of exemptions. All of this awaits the development of published case law, of which there is still relatively little.

Article 16 makes explicit that trade associations are covered by the provisions. Such coverage is probably implicit in the general prohibition that is contained in Article 13; but Article 16 was added to the AML at a late stage in its drafting, because of a prominent case of price-fixing that was organized through a trade association just before the enactment of the AML.[16] Article 16 may also have been included in view of the fact that many trade associations in China are government-run or -inspired and that coverage needed to be indicated unequivocally.

6.1.2 Vertical Agreements

Article 14 of the AML specifically prohibits two types of vertical agreements: fixing resale prices and setting minimum resale prices. Article 14 also includes a sweeping clause that prohibits undertakings from making other vertical arrangements as determined by the enforcement agencies. How the AML applies to recommended and maximum prices, territorial and customer restrictions, exclusive distribution and supply, franchising, and other vertical arrangements is unclear at present and is expected to be determined by the course of secondary rulemaking and enforcement practice.

6.1.3 Exemptions from the Application of the AML

The AML establishes an exemption mechanism that stipulates that the prohibition on horizontal and vertical monopoly agreements shall not apply if the undertakings involved can prove that the agreements are for the purpose of (1) improving technology, or researching and developing new products; (2) upgrading product quality, reducing cost, enhancing efficiency, unifying specifications and standards of products, or implementing a division of labour that is based on specialization; (3) improving operational efficiency and enhancing the competitiveness of small and medium-sized undertakings; (4) realizing social public interests such as energy conservation, environmental protection, and disaster relief; (5) during a period of economic depression, moderating serious sales decreases or production surpluses; (6) safeguarding the legitimate interests of foreign trade and economic cooperation; or (7) other circumstances as stipulated by law and by the State Council.

For an exemption from the application of Articles 13 and 14 based on the first five grounds, the undertakings must additionally prove that the agreement can enable consumers to share the interests that are derived from the agreement and will not severely restrict competition in the relevant market. The first four grounds for exemption could

[16] See NDRC Notice of the Investigation on Price Collusions between Instant Noodle Producers 2007, Chinese version available at http://www.ndrc.gov.cn/xwzx/xwtt/t20070816_154071.htm.

be broadly regarded as efficiency or public interest related. The fifth ground relates to a recession cartel. The exemption concerning foreign trade and foreign economic cooperation includes but is wider than the customary export cartel exemptions that can be found in OECD countries

The reference to the fact that the first five exemptions only apply if they are not associated with a substantial reduction in competition and that consumers will share the benefits from the agreement, may conceivably narrow the scope of the exemptions. Article 15 puts the burden on the enterprises to demonstrate that the agreement meets the exemption criteria but does not indicate who will make the decision. The AML does not specify a mechanism for undertakings to seek a monopoly agreement exemption, nor indicate whether the exemption must be obtained in advance or can be invoked as a defence ex post. Early drafts of the AML provided a notification mechanism, which was finally abandoned.

Clearly, however, the potential for exemption appears to be wide. It is too early to draw lessons from experience. The trend in OECD countries has been for a progressive narrowing of the opportunity for such exemptions to be relied upon. This narrowing has been the product of the development of an ever-stronger pro-competition culture in those countries. In the case of China the extent to which these exemptions are invoked will also be related to the degree to which a competition culture emerges.

6.2 Abuse of Dominance

The AML prohibits firms with a dominant position from abusing that position to eliminate or restrict competition (AML, Art. 6). Chapter 3 on abuse of dominance begins by non-exhaustively listing six types of abuse that are specifically prohibited. These include unfair pricing (selling or buying goods at unfairly high or low prices), below-cost sales, refusals to deal, exclusive or designated dealing, tying or imposing other unreasonable transactional terms, and discriminatory dealing. Other abusive behaviour by dominant undertakings that is determined by the enforcement authorities is also prohibited.[17] With the exception of unfair pricing, the behaviour must be without justification in order to be abusive.

6.2.1 Finding of a Dominant Position

The term "dominant market position" refers to a market position that is held by undertakings that can control the price or volume of products or other trading conditions in the relevant market, or can block or affect the entry of other undertakings into the relevant market (AML, Art. 17). The AML provides a non-exhaustive list of factors for assessing whether an undertaking holds a dominant market position, including: (1) the market share of the undertaking and competitive circumstances in the relevant market; (2) the ability of the undertaking to control the upstream or downstream market; (3) the financial status or technical resources of the undertaking; (4) the extent of dependence on the undertaking by other undertakings; (5) the degree of difficulty

[17] See Article 17 of the AML.

for other undertakings to enter the relevant market; and (6) any other factors that are relevant to determining whether the undertaking holds a dominant market position (AML, Art. 18).

The AML contains three presumptions of the market dominant position of undertakings, which are based entirely on the market share thresholds. It provides that the undertakings can be considered to have a dominant market position if any of the following conditions is fulfilled: (1) the market share of one undertaking is fifty percent or more; (2) the combined market share of two undertakings accounts for two-thirds or more; (3) the combined market share of three undertakings accounts for three-fourths or more. If the combined undertakings fall under conditions (2) or (3), any undertaking that has a market share of less than ten percent shall not be considered to hold a dominant market position. These presumptions are rebuttable. For example, if the undertaking can demonstrate that the relevant market remains substantially competitive, or the undertaking under consideration has no dominant position in relation to the remaining competitors, such undertaking should not be deemed to have a dominant position (AML, Art. 19).

6.2.2 Justifications of Abuse of Dominance

Under the AML, a number of behaviour, if conducted "without justification", may constitute abuse of dominance and are prohibited. These include below-cost sales, refusal to deal, tying and imposing other unreasonable terms, discriminatory treatment, and other abusive behaviour as determined by the enforcement agencies (AML, Art. 17). This means that justifications can be offered as a potential defense against an allegation of abuse of dominance under the AML and the enforcement agencies will assess the behaviour's net effect on competition, instead of applying the prohibitions rigidly. The AML does not clarify what would be construed as acceptable justifications, but the AML-implementing regulations, as discussed in Sect. 7 below, are expected to fill in some of the gaps.

6.3 Concentration of Undertakings

The AML adopts a general regime for applying competition policy to mergers and acquisitions. Under the AML, the concept of "concentrations of undertakings" refers to a variety of circumstances, including (1) mergers, (2) acquisitions of control of other undertakings through purchasing shares or assets, and (3) acquisitions of control of other undertakings, or of the ability to exercise decisive influence over other undertakings, through contract or other means (AML, Art. 20).

6.3.1 Substantive Test

Under the AML, a concentration may be prohibited if it has or is likely to have the effect of eliminating or restricting competition, unless the parties can prove that the concentration will lead to improvements in competition that significantly outweigh its adverse affects on competition, or that the concentration is otherwise in the public

interest. In the review of concentrations, MOFCOM is required to take into account the following factors: (1) the market shares of the undertakings involved in the relevant market and their ability to control the market; (2) the degree of concentration in the relevant market; (3) the effects of the concentration on market entry and technology development; (4) the effects of the concentration on consumers and other related undertakings; (5) the effects of the concentration on national economic development; and (6) other factors that may have an effect on market competition (AML, Art. 27).

Thus, the AML merger control regime will consider the claimed efficiencies and is not tied to the restriction of competition test. However, the reference to public interest and the effects of the concentration on national economic development may encourage MOFCOM to approve or prohibit transactions, based on industrial policy considerations. Once again, much will depend on general attitudes to competition by regulatory bodies, courts and the government behind them. If a strong culture of competition develops, the competition criteria will emerge as the most important.

6.3.2 Notification Thresholds and Review Procedures

Pursuant to the AML, the State Council promulgated the *Rules on Notification Thresholds for Concentrations of Undertakings* (hereinafter "Thresholds Rules") in August 2008. Under the AML, a notifiable concentration may not be implemented without a prior notification. With a preliminary review following the notification, MOFCOM, within thirty days, may either make a decision to open a further review investigation or make a decision that no further investigation will be conducted. If MOFCOM fails to reach a decision within the thirty-day time limit, the proposed concentration is deemed to be cleared (AML, Art. 25). The time limit for the further review is ninety days, which can be extended by up to another sixty days in specified circumstances and with MOFCOM's written notice to the undertakings involved. These circumstances include (1) the undertakings involved agree to extend the time limit; (2) documents submitted by the undertakings involved are inaccurate or need further verification; or (3) the relevant circumstances have significantly changed following the notification (AML, Art. 26).

6.3.3 Additional Reviews on Foreign Takeovers

As discussed above, the "effects doctrine" is incorporated into the AML. Most provisions of the AML apply equally to domestic and foreign firms. The exception is that, under the AML, acquisitions of domestic enterprises by foreign investors, and other forms of concentration involving foreign investors that concern national security, are subject to both a competition review and a national security review "in accordance to the relevant provisions of the State". [18] It should be noted that the M&A Rules

[18] Article 31 of the AML states:

> Where a foreign investor merges and acquires a domestic enterprise or participates in concentration by other means, if state security is involved, besides the examination on the concentration in accordance with this Law, the examination on national security shall also be conducted in accordance with the relevant State provisions.

already contained a national security review, under which a foreign takeover required an application to MOFCOM if the foreign firm intended to take control of a domestic enterprise that is in a key industry or that has significant Chinese brands, or if the transaction could have an impact on national economic security. The fact that MOFCOM is probably responsible for both merger control and national security review gives rise to concerns that this may compromise its competition assessment of a proposed transaction. The best practice is to separate the assessments.

On 3 February 2011, the General Office of the State Council promulgated the *Circular on Establishing a Mechanism of Security Review of Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (hereinafter "Circular on National Security Review"), which took effect on 6 March 2011.[19] The Circular on National Security Review sets out the scope, content, review mechanism, and procedures of the national security review. An Inter-Ministerial Joint Committee is established under the State Council to be responsible for the national security review, and is led by the NDRC and MOFCOM.[20] The Circular on National Security Review establishes China's first formal process for evaluating national security issues that arise from foreign takeovers and clarifies how Article 31 of the AML will be applied. Following the issue of the Circular on National Security Review, MOFCOM stated that the Department of Foreign Investment Administration under MOFCOM has been drafting operational rules and procedures to increase the effectiveness and transparency of the national security review system.[21]

6.4 Administrative Monopoly

The AML deals extensively with government restrictions on competition. By contrast, similar restrictions on competition especially on interstate or intra-community competition are normally handled in other countries by meta laws, constitutional and treaty provisions, or internal market policies, which are backed by major political support and strong enforcement. The strong political support derives most often from the fact that such laws were a critical part of the establishment of a new nation (e.g. the foundation of the US and Australia) or the European Community.

Article 8 of the AML generally prohibits the abuse of administrative powers by public authorities (including administrative agencies and organizations that are empowered by laws or regulations for public affairs administration) to eliminate or restrict competition; this is a type of behaviour that is widely referred to as "administrative monopoly" (AML, Art. 8). Chapter 5 of the AML specifically prohibits public authorities from designated transactions, hindering free movement of goods among regions, restricting non-local undertakings' bidding activities in local markets, restricting non-

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[19] Official Chinese text of the Circular on National Security Review is available at: http://www.gov.cn/zwgk/2011-02/12/content_1802467.htm; English translation is available at: http://www.fdi.gov.cn/pub/FDI_EN/Laws/law_en_info.jsp?docid=130963.

[20] See Circular on National Security Review, Sec. III.

[21] See MOFCOM monthly press conference on 17 February 2011, Chinese version of the script available at: http://video.mofcom.gov.cn/topics/2011/0218/2620.html.

local undertakings' investment and establishment of subsidiaries in local markets, forcing undertakings to engage in prohibited monopoly conduct, and promulgating anti-competitive rules (AML, Arts. 32–37). The AML does not provide a sweeping clause to deal with other types of administrative monopoly, but the general prohibition against administrative monopoly that is set out in Article 8 may provide a legal basis for action.

Administrative monopoly is a substantial phenomenon in China. To protect struggling local enterprises and preserve jobs, many local governments have established trade barriers such as local customs posts and have supported exclusionary tactics ranging from price predation to obstructing transport. Overt barriers and exclusive dealing rules have been prohibited by the AUCL since 1993, and SAIC has had some success in correcting these "regional blockades".[22]

But anti-competitive regional protectionism can take more subtle forms. Measures such as discrimination in taxes, standards, inspections, and licensing also create significant barriers to commerce and competition. Local governments have sometimes blocked mergers that would eliminate the separate identity of local firms or prevented firms from exiting unproductive businesses through bankruptcy or merger. By interfering with restructuring in order to protect local business interests, local governments undermine the efficiency-promoting goals of reducing excess capacity and realising economies of scale. The general prohibition in the AML and the detailed listing of prohibited practices will extend enforcement oversight to indirect, complex abuses and barriers.

However, the administrative monopoly provisions of the AML are relatively weak and represent a compromise. The remedy against administrative monopoly is administrative. The enforcement agencies have no authority to enforce the administrative monopoly provisions but only have powers to point out the problem to the superior agency of the perpetrator and make proposals. Furthermore, the AML does not provide a specific penalty on administrative monopoly although "discipline" is mentioned. The administrative correction called for by the AML is similar to what is already provided in the AUCL, except that the AUCL does not authorise the enforcement authority to recommend action by the offender's superior body. There is thus concern about a lack of uniformity and dilution of message. A more significant problem may be the delegation of enforcement to local levels. Local enforcers are employees of the government that is engaging in the abuse.

In this light, the role of the anti-monopoly enforcement authorities under the AML verges on advocacy. For example, Article 37 prohibits regulations that eliminate or restrict competition, and thus it explicitly authorises the anti-monopoly enforcement authority to raise concerns about regulations that interfere with competition more than is necessary to achieve their other, presumably legitimate purposes. Correction and discipline by the administrative superior body, as provided by the AUCL and AML, may be the strongest power that would be clearly consistent with the current organising

[22] The term "regional blockades" is widely used in China to refer to trade barriers that have been imposed by local governments, such as setting up checkpoints at regional borders to obstruct the transport of goods produced in other regions. As a typical form of local protectionism, regional blockades divide the national market into many narrow local markets; see (Wang, 2002, p. 211).

principles of China's government bodies. Authorising the anti-monopoly enforcement authorities to initiate the inquiry and recommend action gives them a positive role. The power to make the recommendation public could be important to making the process effective.

Government restrictions on competition are important in all economies, and are usually at least as important as the business restrictions brought about by cartels, anticompetitive mergers, and abuse of dominance. China is no exception. There is, however, an additional overlay: In North America, Europe, and Australia restrictions on regional competition are usually outlawed by constitutional or treaty provisions, which are themselves key laws that have been established for the fundamental purposes of nation or community building and strictly enforced by the highest courts in the law.

China has no such meta laws, nor even a strong tradition of eliminating such restrictions. Many factors contribute to the importance of these restrictions: China's large size; a history, in Maoist times, of decentralising the development of industry in the interests of defence policy; the high dependence for revenue by sub-national governments on monopolies that emerge from protected local enterprises; and local protectionism generally.

There are conceptual and practical difficulties in governments' legislating to outlaw their own anticompetitive laws and practices, and even those of government at lower levels. Nevertheless the issue was recognised as too important to be omitted from the scope of the AML. Accordingly the compromise has been to outlaw the abuse of administrative monopoly but to rely essentially on administrative processes to resolve the matters. Thus far, abuse of administrative monopoly appears not to have been accorded very high priority in the application of the AML, and instead the emphasis has been on the application of the conventional elements of the law.

6.5 Enforcement Mechanism

6.5.1 Multiple Enforcement Agencies

As discussed above, before the AML took effect, China dealt with competition-related issues through a series of laws, regulations, rules, and policies. The NDRC, the SAIC, and MOFCOM had played separate, but sometimes overlapping, roles in regulating competition. The three agencies' authority was primarily established by the AUCL, the Price Law, and the M&A Rules.

The AML does not improve the multi-agency mechanism, and the enforcement power of the AML is still divided between the three agencies. The NDRC is responsible for the prohibition of price-related monopoly agreements, abusive conduct by dominant undertakings, and administrative monopoly. The SAIC is responsible for the prohibition of non-price-related monopoly agreements, abusive conduct by dominant firms, and administrative monopoly. MOFCOM is responsible for merger control.

The AML provides that the enforcement agencies, based on their needs, may authorize their corresponding organs at the provincial level to be in charge of the anti-monopoly enforcement work (AML, Art. 10, para. 2). In light of the division of AML

enforcement power, an Antimonopoly Commission (AMC) was established under the State Council as a high-level agency to organize, coordinate, and guide anti-monopoly enforcement work. So far it has not been very visible.

The AML lacks an independent enforcement agency with sufficient authority because none of the three agencies that enforce the AML is structurally independent from the government. Under the current enforcement mechanism, transparency of rule-making and of reasons for decisions is of particular importance, as this will show that decisions are based on vigorous competition analysis rather than on bargains among interests. In addition, unless there is close coordination the divided authorities among the three agencies have the potential to create gaps and overlaps, inconsistencies, inefficiencies and inter-agency frictions.

Coordination between agencies will be one of the key challenges to the coherent enforcement of the AML. A simple example would arise where an abuse of dominance involves a mixture of price-related and non-price related elements. However, it should be noted that the existence of more than one enforcement agency, not to mention private enforcement rights, and the existence of layers of agencies at different levels of government, is hardly unknown in OECD countries and has not created unworkable situations.[23]

6.5.2 Sanctions and the Role of the Courts

Under the AML, the enforcement agencies may impose cease and desist orders, confiscate the illegal gains, and/or impose fines of between one and ten per cent of an undertaking's annual turnover in the preceding year for an infringement of the AML rules on monopoly agreements or abuse of dominance (AML, Arts. 46 and 47). In a case where the monopoly agreement has not been implemented, a fine of up to RMB 500,000 (approximately US$78,000) may be imposed. Implementing an anti-competitive concentration in violation of the AML merger control rules is liable to a fine of up to RMB 500,000 (US$78,000) (AML, Art. 48).

The people's courts have the power to review enforcement actions that are taken pursuant to the AML (AML, Art. 53 and 50). In addition, Article 50 of the AML entitles individuals and entities to bring private actions to the people's courts, that would challenge monopoly conduct in violation of the AML and claim damages.

The modern Chinese Law is based on the civil law system and is derived from continental legal principles. In contemporary China, the legislature retains power to interpret laws, and the Chinese Constitution is ambiguous about the scope and nature of judicial review of legislation. In addition, the Communist Party of China (CPC) still

[23] When the United States expressed concerns about the multiple Chinese enforcement agencies, the concern was noted by the China authorities who, however, drew attention to the existence of two federal antitrust agencies (the US Department of Justice's Antitrust Division, and the Federal Trade Commission), along with several other national agencies such as the Federal Communications Commission, the Federal Energy Regulatory Commission, the Federal Reserve Board, and the Department of Transportation, all of which play a role in competition law broadly defined. As well, it was noted that some 37 states play a role in enforcing US antitrust law, along with several hundred million citizens with private enforcement rights. The concerns of the European Union, with its numerous member state agencies, were also noted and received a similar response.

exercises authority over the judiciary. An instrumentalist and pragmatic view toward the role of the law is prevailing.

7 Latest Development of the AML: Rule Makings And Enforcement Records

7.1 The AML-Implementing Regulations

The AML contains the objectives and principles, and establishes a general framework of competition law in China. Over 3 years after the commencement of the AML, a series of AML-implementing regulations have been issued or are under consideration. Most implementing regulations have been published for comments before enactment, and the enforcement agencies have embraced opinions from foreign and domestic interested parties.

The NDRC, as the agency enforcing the AML rules on price-related monopoly agreements, abuse of dominance and administrative monopoly, has issued the *Measures on the Prohibition of Price Monopoly* and the *Measures on the Administrative Enforcement Procedures of the Prohibition of Price Monopoly*. [24] The SAIC, as the agency that enforces the AML rules on non-price-related monopoly agreements, abuse of dominance, and administrative monopoly, has issued the *Measures on Procedures for Investigating and Handling Cases of Monopoly Agreements and Abuse of Market Dominance*, the *Measures on Procedures for the Prohibition of Abuse of Administrative Powers to Eliminate or Restrict Competition, the Measures on the Prohibition of Monopoly Agreements*, the *Measures on the Prohibition of Abuse of Dominant Market Position*, and the *Measures on the Prohibition of Abuse of Administrative Powers to Eliminate or Restrict Competition*.[25]

In the merger control area, the State Council has issued the *Rules on Notification Thresholds for Concentrations of Undertakings*, and MOFCOM has issued the *Measures on the Notification of Concentrations of Undertakings* and the *Measures on the Review of Concentrations of Undertakings*.[26] In addition, MOFCOM has issued a series of other implementing regulations and guiding opinions to provide guidance to interested parties on important issues such as notifiable matters, calculation of turnover for merger notification purposes, procedures of divestiture, etc.

These implementing regulations are welcome and encouraging, as they delineate the AML provisions, codify the enforcement agencies' practices, and thus significantly increase transparency and predictability. For example, as was discussed above, the AML does not clarify what would be construed as acceptable "justifications" for dominant undertakings' otherwise prohibited behaviour. The AML-implementing regulations are expected to fill in the gap. For example, the NDRC *Measures on the Prohibition of Price Monopoly* clarify what would constitute acceptable justifications

[24] Official Chinese text of these measures is available at http://jjs.ndrc.gov.cn/zcfg/; English translation is available by subscription at http://www.lawinfochina.com.

[25] Official Chinese text of these measures is available at http://www.saic.gov.cn/fldyfbzdjz/; English translation is available by subscription at http://www.lawinfochina.com.

[26] Official Chinese text of these measures is available at http://fldj.mofcom.gov.cn/c/c.html; English translation is available by subscription at http://www.lawinfochina.com.

for a refusal to deal by way of imposing excessively high selling prices or low purchasing prices, including (1) the counter parties have seriously bad credit records or their operational conditions continue to deteriorate, which may cause significant risks to transaction safety, (2) the counter parties are able to purchase the same or substitutable goods from other sources at reasonable prices or to sell the goods to other undertakings at reasonable prices, and (3) other reasons that can prove that the refusal is justified.[27]

7.2 Enforcement Cases[28]

Since the AML entered into force, MOFCOM has been an active enforcer of the merger control law. From 1 August 2008 to 31 May 2011, MOFCOM has completed reviews of 240 merger filings, of which 233 were cleared unconditionally, six were conditionally cleared, and one was prohibited.[29] In early June 2011, MOFCOM published the *Uralkali/Silvinit* decision, which was MOFCOM's seventh conditional clearance to date.[30] Local bureaus of the NDRC in Guangxi province took the first official action in early 2010 against a price cartel involving local rice noodle producers.[31] In July 2010, the NDRC announced that its local bureaus had made three decisions in relation to price collusion in the markets for green beans and garlic and imposed fines on a large number of domestic agricultural trading companies.[32] A number of other official enforcement actions pursuant to the AML have been undertaken by the SAIC thus far.[33]

Clearly it is too early to generalise about enforcement. By far the most controversial merger case occurred when MOFCOM issued its decision to prohibit the proposed US$2.4 billion acquisition of China Huiyuan Juice Group Limited (Huiyuan) by The Coca-Cola Company (Coca-Cola) on 18 March 2009 (the *Coca-Cola/Huiyuan* decision).[34] It should be noted, however, that the decision is not out

[27] See NDRC Measures on the Prohibition of Price Monopoly, Art. 13.

[28] For up-to-date information on the enforcement of the AML, see *China Competition Bulletin*, a monthly publication that is edited by Fels et al. (2011) and is available at: http://www.anzsog.edu.au/research/publications/the-china-competition-bulletin.

[29] Information disclosed by Mr Shang Ming, Director General of the Anti-Monopoly Bureau of the MOFCOM at the 7th International Symposium of Competition Law and Policy, held on 3 and 4 June 2011 in Beijing. See *China Competition Bulletin*, Special Report, June 2011 at: http://www.anzsog.edu.au/content.asp?pageId=261. The six conditional clearance decisions include the *InBev/Anheuser Busch*, *Mitsubishi Rayon/Lucite*, *Pfizer/Wyeth*, *GM/Delphi*, *Sanyo/Panasonic*, and *Novartis/Alcon* decisions; and the prohibition decision involves the *Coca-Cola/Huiyuan* transaction. Official Chinese text of these decisions is available at: http://fldj.mofcom.gov.cn/ztxx/ztxx.html.

[30] Official text of the *Uralkali/Silvinit* decision is available at: http://fldj.mofcom.gov.cn/ztxx/ztxx.html.

[31] An official report on the decision against the rice noodle cartel was published by the NDRC on 30 March 2010, available at: http://www.ndrc.gov.cn/xwfb/t20100330_338105.htm (in Chinese).

[32] An official announcement was published by the NDRC on 2 July 2010, available at: http://jjs.ndrc.gov.cn/gzdt/t20100702_358457.htm (in Chinese).

[33] Xinhua News Agency, 'Trade Association Allocated Market Share; Jiangsu Completed the First Anti-Monopoly Investigation', available at: www.js.xinhua.org/xin_wen_zhong_xin/2011-01/21/content_21923072.htm (in Chinese).

[34] See MOFCOM announcement of the Coca-Cola/Huiyuan Decision; official Chinese text of the decision available at: http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html (in Chinese).

of line with international precedents. A proposed global merger of Coca-Cola and Schweppes was opposed on similar grounds in many countries before being abandoned. In addition, Australia blocked a proposed Coca-Cola acquisition of the Berri fruit juice company,[35] which was a case that drew MOFCOM's close attention during its review of the Coco-Cola/Huiyuan deal.

Another important decision occurred on 13 August 2010, when MOFCOM announced that it approved the proposed acquisition of Alcon by Novartis, which were two global pharmaceutical companies that were headquartered in Switzerland.[36] The decision was conditional upon Novartis' commitments made with respect to ophthalmological pharmaceutical and contact lens care products in China. This decision was also not without controversy. In both cases only relatively brief explanations of the decisions were provided. However, it needs to be recognised that some lack of detail is the norm in the early days of the operation of a new competition law in most countries, especially in the area of merger law where there is pressure for quick decisions.

8 Conclusions

The AML embodies the key features of a modern competition law, with its prohibitions on cartels, abuse of dominance, and anticompetitive mergers; adopts generally accepted principles and standards of competition law (although leaving much room for interpretation) and is accompanied by appropriate sanctions and administrative arrangements. Somewhat unusually it also has prohibitions on the abuse of administrative monopoly.

Thus, whilst the AML embodies the standard elements of a modern competition law, it is also true to say that it has "Chinese characteristics". These especially recognise that SOEs have a special role in the Chinese economy; that there is a desire not to unduly inhibit the development of Chinese businesses; and that there are distinctive challenges that arise from the widespread existence of administrative monopoly and local protectionism. The "Chinese characteristics" also reflect unresolved policy conflicts between supporters of a conventional OECD-style competition law and policy and the proponents of other approaches that are based on a greater role for SOEs and for industrial policy considerations.

Footnote 34 continued
For further comments on the Coca-Cola/Huiyuan Decision, see Lin and Zhao, Merger Controzl Policy under China's Anti-Monopoly Law, in this volume.

[35] For ACCC's press release and competition analysis of the proposed *CCA/Berri* transaction, see http://www.accc.gov.au/content/index.phtml/itemId/486557/fromItemId/751043 and http://www.accc.gov.au/content/index.phtml/itemId/407482/fromItemId/378016. The ACCC considered that the CCA could exert its market power to link sales of the Berri fruit juice products to its dominant Coca-Cola soft drink product and retailers would also have commercial incentives to bundle Berri's fruit juice products with CCA's leading portfolio of beverages. The ACCC's investigation strongly suggested that the likely effect of the Berri acquisition would be reduced consumer choice and, ultimately, higher prices for consumers.

[36] MOFCOM announcement of the Novartis/Alcon Decision, official Chinese text of the decision available at: http://fldj.mofcom.gov.cn/aarticle/ztxx/201008/20100807080639.html (in Chinese). For further comments on the *Novartis/Alcon* Decision, see Shan et al. China's Anti-Monopoly Law: What is the Welfare Standard? in this volume.

Competition law differs at least in degree from many other forms of the law, such as contract or property law in that rather than being technical in nature its interpretation and application cannot be easily separated from the particular policies and themes that rule the day. These change over time in any economy. In the US, for example, the history of competition law is that the initial approach of enforcement under the Sherman Act with its populism and focus on big business was quite different from the modern enforcement approach with its emphasis on economic efficiency. So the underlying policy that drives the application of the law and influences its detailed approach may differ from one country to another and may change considerably over time. This is especially the case in China, with its profound differences in economic policy and governance, as compared with OECD countries. Already it is apparent that there is a degree of uncertainty, contradiction, ambiguity, and shifting objectives in the policy background that reflects these tensions, and this adds to the complexity of interpretation, application, and enforcement of the law.

Competition law differs also from many other areas of microeconomic policy. The main need in many areas of microeconomic reform is to remove government restrictions on competition, whether they are import restrictions, domestic entry barriers, or the like. There is very little administrative difficulty in doing this. Once the decision to deregulate or liberalise has been made, the government normally merely has to sign a piece of paper that gives effect to the decision, and there is little or nothing for it to do after that: the market is simply left on its own to get to work in reallocating resources.

Competition law is different: Whilst its introduction can be triumphantly proclaimed by governments, how it operates in practise is all-important. A vast amount of administrative, legal, economic, and political work is required. Institutions have to be established, investigations initiated, analysis and decisions made, litigation conducted, and enforcement applied. There are also major challenges in securing economy-wide compliance; in undertaking educational and compliance programs; and in developing a competition culture on the part of the community and business. Usually there are major challenges from powerful interest groups and businesses.

The most important test of the Chinese competition law is not how well it is designed, but how well it is being applied in practise. In this regard the challenge of operating competition law in practise in China is huge, with its population of 1.3 billion, its five levels of government, and its geographical spread. Moreover, there are major challenges both in building a culture that supports and enforces competition law and in establishing institutional machinery that enables enlightened and consistent effect to be given to them.

The AML has been in force for over 3 years. Information about the application and enforcement is relatively scarce because of the small number of cases and limited transparency, and it is still too early to reach many conclusions.

However, a discernible early feature has been the prominent role that has been assigned to merger law. This is an area of much activity. This contrasts with many countries that sidelined merger law in their early days of competition law enforcement. The fact is, however, that merger law is a critical, integral part of competition law, and there are major disadvantages in not adopting it from the start. Arguably merger law is a great deal more important than any other part of competition law because it deals with structural matters. Putting an end to cartels is useful, but if the industry structure is

favourable to collusion then the economic effect of terminating illegal cartels may not be very great because much the same price outcomes may still occur without unlawful behaviour after the breakup.

A sound approach to mergers tends to inhibit the adoption of anticompetitive structures that facilitate collusion about prices. Moreover, in countries that initially attack cartels and ignore mergers there is a tendency for members of those cartels to seek to merge once they have been outlawed, generating much the same adverse affects on consumers as the cartel did. Moreover, once a one-sided competition law is adopted it tends to accelerate merger activity in anticipation of the adoption in the future of the merger element of a competition law.

Another consequence of taking merger law seriously in the early days is that it forces the competition regulator to make early decisions in the life of the competition law. Without a merger regime a regulator may in its early years take a very long time before it makes legally important decisions at all, and face further legal delays once it acts.

As noted, superficially at least, merger law seems to be an area of great visible activity in the competition law of China. One of the major experiences of competition law is that in its early days some significant mistakes can be made. There are no signs at this stage that China has made serious mistakes in the application of merger law and the approach has been broadly sensible and reasonably timely in decision making, especially considering that it is a new activity.

Finally there is a wider issue: the challenge to adopt and implement a comprehensive national competition policy. A central element of a national competition policy would be a system to review all laws and policies, including abuse of administrative monopoly, that restrict competition and to locate and correct constraints on enterprise activity that are more stringent than necessary to correct market failure or to achieve other policy goals. This task has received little attention in China, although it is fair to note that there has been equally little attention paid to the issue in most OECD countries.

It is too early to draw many conclusions about the impact of the AML in these early days of the application of the law. Whilst the challenges, especially of enforcement, seem daunting, a start has been made in a journey of a thousand miles.

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